

**VAL D. CARLOW, Deceased**  
Claimant

**KONZA CONSTRUCTION COMPANY, INC.**  
Respondent

**BUILDERS' ASSOCIATION  
SELF-INSURERS' FUND**

Docket No. 227,051

## ISSUES

The Administrative Law Judge found the decedent, Val D. Carlow, on February 24, 1997, had met an untimely accidental death while employed by the respondent. At the time of the decedent's death, he had a blood alcohol concentration of .04 percent. Accordingly, the Administrative Law Judge found, in accordance with the statute, that decedent was impaired due to alcohol at the time of the accident. But the Administrative Law Judge also found the respondent failed to prove that decedent's accidental death was contributed to by the decedent's impairment due to the consumption of alcohol.<sup>1</sup> Decedent's surviving dependent spouse and dependent son were awarded death benefits in accordance with the provisions of K.S.A. 44-510b *et seq.*

On appeal, respondent contends it proved that decedent's impairment due to the consumption of alcohol contributed to his accidental death. Accordingly, respondent argues the Appeals Board should reverse the Administrative Law Judge's Award and deny the decedent's dependents' request for death benefits.

Conversely, decedent's dependents request the Appeals Board to affirm the Administrative Law Judge's Award. But the decedent's dependents argue the decedent's blood alcohol tests results are inadmissible because the respondent failed to prove there was probable cause to believe the decedent used, had possession of, or was impaired by the alcohol while working.<sup>2</sup>

The issues before the Appeals Board concerning this appeal are as follows:

1. Are the blood alcohol test results admissible evidence?
2. If the blood alcohol test results are admissible, did the respondent prove that decedent's impairment due to alcohol contributed to his accidental death?

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the record, considering the briefs, and hearing the parties' arguments, the Appeals Board concludes the Administrative Law Judge's decision to award death benefits to decedent's dependents, the surviving spouse and son, should be affirmed.

#### **1. Are the blood alcohol test results admissible evidence?**

The Administrative Law Judge found "It has been conceded that Mr. Carlow's blood alcohol was .04%." But the decedent's dependents argued, before the Administrative Law Judge and renewed the argument before the Appeals Board, that the decedent's blood alcohol test results were not admissible evidence. This particular issue is confused because the parties, in a stipulation filed on December 9, 1998, agreed the decedent's

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<sup>1</sup>See K.S.A. 1996 Supp. 44-501(d)(2).

<sup>2</sup>See K.S.A. 1996 Supp. 44-501(d)(2)(A).

blood alcohol test results should be admitted into evidence without the necessity of foundation testimony from the KBI technicians who conducted the blood alcohol tests.

But decedent's dependents contend the decedent's blood alcohol test results, although stipulated as valid without foundation testimony, are not admissible because the respondent failed to prove there was probable cause to believe the decedent used, had possession of, or was impaired by alcohol while working. This is the first of six factors required by statute before the results of a blood alcohol test can be admitted into evidence in a workers compensation proceeding.<sup>3</sup>

Decedent died from a combination of drowning and traumatic asphyxia when the dump truck he was driving turned over into a dredge pond located on respondent's property. The accident occurred at 2:30 p.m., on February 24, 1997, in Geary County, Kansas. At the request of the Geary County deputy coroner, Marc Felts, M.D., the decedent's body was transferred to the Stormont-Vail Hospital morgue located in Topeka, Kansas.

On the date of the accident, at approximately 7:30 p.m., Shawnee County coroner Erik K. Mitchell, M.D., a forensic pathologist, performed an autopsy on decedent. During the autopsy, Dr. Mitchell personally collected blood samples. Those samples were then labeled, sealed, and taken to the KBI laboratory for testing. The results of the KBI blood test were then offered into evidence at Dr. Mitchell's deposition. The decedent's dependents, at that time, objected to the test results on the basis of lack of foundation. But as noted above, the decedent's dependents later stipulated the blood test results could be admitted without further foundation. The KBI ethyl alcohol analysis test result was .04 grams per 100 milliliters of blood.

Dr. Mitchell established, through his testimony, that when a person died in an accident and an autopsy was performed, then it was routine and required to draw blood from the deceased person and to submit the blood for testing for blood alcohol concentration.

The burden is placed on the respondent to defeat a workers compensation claim based on claimant's intoxication.<sup>4</sup> An injured worker is conclusively presumed impaired due to alcohol if it is shown the worker at the time of the accident had an alcohol concentration of .04 percent or more. But before the chemical test results are admissible into a workers compensation case, the respondent also has the burden to prove there was probable cause to believe the injured worker used, had possession of, or was impaired by the drug or alcohol while working.<sup>5</sup>

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<sup>3</sup>See K.S.A. 1996 Supp. 44-501(d)(2)(A).

<sup>4</sup>See Poole v. Earp Meat Co., 242 Kan. 638, Syl. ¶4, 750 P.2d 1000 (1998).

<sup>5</sup>See K.S.A. 1996 Supp. 44-501(d)(2).

The Workers Compensation Act does not define probable cause. The Appeals Board, however, has defined probable cause as the phrase relates to the intoxication statute as "having sufficient information to lead a reasonable person to conclude that there is a substantial likelihood that drugs or alcohol were either used by or impaired the injured worker."<sup>6</sup>

Here, the blood alcohol test was conducted because it is a routine procedure required of the coroner when conducting an autopsy of the body of an accident victim. The Appeals Board concludes, based on the circumstances of this case, there was also sufficient evidence to establish probable cause for the blood alcohol test results to be admitted into evidence. First, the respondent had knowledge that decedent was a heavy drinker and an alcoholic. Second, the circumstances surrounding the decedent's accidental death were unusual and unexplained. Without any reasonable explanation, the decedent drove the respondent's loaded dump truck past the scale where he was required to weigh the load, into a salvage area, and then turned the dump truck over into a dredge pond. There was absolutely no reasonable explanation for the decedent to travel the route he took instead of the regular designated route through the scale to weigh the load of sand.

**2. Did the respondent prove that decedent's impairment due to alcohol contributed to his accidental death?**

The Administrative Law Judge found decedent's blood alcohol concentration was .04 percent. And in accordance with the statute, he found the decedent was impaired at the time of his accidental death. But the Administrative Law Judge went on to find the respondent failed to prove decedent's impairment due to alcohol contributed to his accidental death.<sup>7</sup>

For the reasons stated in the Administrative Law Judge's findings and conclusions, the Appeals Board agrees the respondent failed to prove that the decedent's impairment due to alcohol contributed to his accidental death. The Appeals Board finds the Administrative Law Judge's findings and conclusions are accurate and supported by the record. The Appeals Board hereby approves those findings and conclusions and adopts them as its own.

In particular, the testimony by respondent's expert witness, P. Brent Koprivicia, M.D., was persuasive that it was clear that .04 percent level of alcohol in the decedent's blood did not impair the decedent to a level that he would have gotten lost and driven the wrong direction. But Dr. Koprivicia did think decedent's fine coordination and distance judgement may have been impacted because of the alcohol. The doctor opined the alcohol could have made some contribution for decedent's driving too close to the dredge pool embankment so the wheel of the dump truck would have slide off into the water.

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<sup>6</sup>See Ogden v. Evcon Industries, WCAB Docket No. 230,945 (December 1999).

<sup>7</sup>See K.S.A. 1996 Supp. 44-501(d)(2).

But the Appeals Board concludes the record as a whole does not support Dr. Koprivicia's opinion that decedent's impairment due to alcohol contributed to his accidental death. First, decedent had loaded his dump truck with sand, weighed the load at respondent's scales, delivered the sand, and returned to respondent's property without incident on three separate occasions before the fatal accident. Second, because decedent was a heavy drinker, a .04 percent concentration in decedent's blood would only slightly impair the decedent. Third, such a small concentration of alcohol in decedent's blood would not have been the reason decedent departed drastically from his regular route and drove into the dredge pond. Finally, as described in his deposition testimony, Jerry Lee Campbell, an employee of the respondent on the date of claimant's accident, actually witnessed the accident. He heard claimant's dump truck hit the eleven-foot washout area before the dump truck slid into the pond. He described, that after the dump truck hit the washout area, it bounced, turned toward the dredge pond, and then slipped off the dredge pond embankment into the water. The Appeals Board finds this accident description more generally describes the decedent losing control of the truck because the truck hit the unknown washout area. The out of control truck was impelled upon the embankment of the dredge pond and then slipped from the embankment turning over in the water.

Respondent contends Dr. Koprivicia's opinion that decedent's impairment due to alcohol contributed to the accident is uncontradicted and satisfies the requirement that alcohol made some minor contribution to claimant's accidental death. The Appeals Board disagrees. When all the evidence in the record is considered, Dr. Koprivicia's opinion, that decedent's impairment due to alcohol contributed to his accidental death, is based only on speculation and should be given little weight in deciding this case.

Therefore, based on the reasons stated above and those contained in the Administrative Law Judge's Award, the Appeals Board concludes that respondent failed to prove by the preponderance of the credible evidence the decedent's impairment due to alcohol contributed to his accidental death. Accordingly, as found by the Administrative Law Judge, the decedent's surviving spouse and son are entitled to death benefits.

#### **AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that Administrative Law Judge Bryce D. Benedict's January 6, 1999, Award should be, and the same is hereby, affirmed in all respects.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of April 2000.

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BOARD MEMBER

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**CONCURRING OPINION**

I agree with the majority that the Award should be affirmed. But I disagree with the majority's conclusion that the drug screen results are admissible.

The Workers Compensation Act severely restricts the admission of drug screen test results. The Act provides that before the results of a drug or alcohol test can be admitted the employer must prove the following:<sup>8</sup>

- (A) There was probable cause to believe that the employee used, had possession of, or was impaired by the drug or alcohol while working;
- (B) the test sample was collected at a time contemporaneous with the events establishing probable cause;
- (C) the collecting and labeling of the test sample was performed by a licensed health care professional;
- (D) the test was performed by a laboratory approved by the United States department of health and human services or licensed by the department of health and environment, except that a blood sample may be tested for alcohol content by a laboratory commonly used for that purpose by state law enforcement agencies;

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<sup>8</sup> K.S.A. 1996 Supp. 44-501(d)(2).

(E) the test was confirmed by gas chromatography, gas chromatography-mass spectroscopy or other comparably reliable analytical method, except that no such confirmation is required for a blood alcohol sample; and

(F) the foundation evidence must establish, beyond a reasonable doubt, that the test results were from the sample taken from the employee.

I agree that the Act does not define probable cause. But the Appeals Board has previously defined probable cause in this setting to mean “having sufficient information to lead a reasonable person to conclude that there is a substantial likelihood that drugs or alcohol were either used by or impaired the injured worker.”<sup>9</sup>

The evidence fails to establish respondent had probable cause to believe that the decedent had either used, had possession of, or was impaired by drugs or alcohol while working on February 24, 1997. The only information respondent had when the blood test was taken was that the decedent’s dump truck turned over into the dredge pond. That fact standing alone does not constitute probable cause to believe claimant was impaired or had used drugs or alcohol. There were no facts known by the respondent that would have led a reasonable person to believe or conclude drugs or alcohol played a part in the accident more so than an unrelated medical condition or equipment failure.

Because the results of the drug screen are not admissible and, therefore, not part of the evidentiary record, the record lacks other evidence for a reasonable person to conclude that decedent’s accident was contributed to by his use of drugs or alcohol.

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BOARD MEMBER

c: Roger D. Fincher, Topeka, KS  
Wade A. Dorothy, Lenexa, KS  
Bryce D. Benedict, Administrative Law Judge  
Philip S. Harness, Director

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<sup>9</sup> Bohannon v. Dynamic Drywall, WCAB (October 1999), citing Lindenman v. Umscheid, 255 Kan. 610, 875 P.2d 964 (1994), and In re Estate of Campbell, 19 Kan. App. 2d 795, 876 P.2d 212 (1994), both of which define probable cause in the context of civil proceedings. In Lindenman, the Kansas Supreme Court defined probable cause in a malicious prosecution case as “reasonable grounds for suspicion supported by circumstances sufficiently strong in themselves to warrant a cautious or prudent person in the belief that the party committed the act of which he or she is complaining.” In Campbell, the Court of Appeals defined probable cause in a will contest as “the existence of evidence . . . which would lead a reasonable person, properly informed and advised, to conclude . . . .”